

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 439 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE PRADIP KUMAR SARKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

SHAILESHKUMAR SHANKERLAL PATEL

Versus

COLLECTOR

Appearance:

MR HM PARIKH for Petitioner
GOVERNMENT PLEADER for Respondent No. 1
MR HARIN P RAVAL for Respondent No. 2
UNSERVED-REFUSED (R) for Respondent No. 3
RULE SERVED BY DS for Respondent No. 4
MR PS CHAMPANERI for Respondent No. 5

CORAM : MR.JUSTICE PRADIP KUMAR SARKAR

Date of decision: 18/10/2000

CAV JUDGEMENT

The petitioner, Shaileshkumar S. Patel contested the election for a Councillor in Ward No.2 of Godhra Nagar Palika. The election was declared by notification dated 6-12-1999 and election was held on 2-1-2000 and counting of votes was taken place on 5-1-2000. The petitioner was declared elected as a Councillor of Godhra Nagar Palika on 5-1-2000. The respondent No.1, Collector of Panchmahals issued the notice calling the first meeting of the Nagar Palika after the election on 12-1-2000 and one of the items of the agenda for the said meeting was to elect President and Vice President of the Municipality. The Deputy Collector, Godhra was nominated as President for the same meeting. The meeting was scheduled to be held on 19-1-2000. The respondent No.3, Murlidhar Rochimal Mulchandani filed an application before the Collector, respondent No.1 under Section 38 of Gujarat Municipalities Act contending that the respondent No.3 had moved an Election Petition being Election Petition No.1/2000 before the District Court at Godhra on 7-1-2000, which is pending in the Court. It is alleged that the wife of the petitioner Kalpanaben Shaileshbhai Patel is serving as a teacher in Gujarati in the School run by Godhra Nagar Palika and that the petitioner has interest in the Godhra Municipality and hence the petitioner is disqualified for being a Councillor of the same Municipality. The Election Petition was moved before the Collector on 18-1-2000 and along with the Application under Section 38 of the Gujarat Municipalities Act, a Special Application for temporary injunction was also filed before the Collector. The Collector, respondent No.1, passed an ex-parte order in the said Application of the respondent No.3 restraining the petitioner from taking part in the Election of President and Vice President scheduled to be held on 19-1-2000. Copy of the order is annexed at "E". By that order the petitioner was restrained from contesting election and/or participating in the meeting scheduled to be held on 19-1-2000 for the election of President and Vice President. It is said that the order passed by the Collector is contradictory to the Provisions of law and principles of natural justice and it is passed with a malafide intention so that the petitioner cannot contest the Election and cannot participate in the Election of President and Vice President. The petitioner accordingly prayed for quashing and setting aside the election of President and Vice President elected in the meeting on 19-1-2000 and also for a direction to hold fresh election for President and Vice President of Godhra Municipality. The respondents filed separate counter affidavits.

It is contended by the respondents that the post of President of Godhra Municipality is a reserved post for a candidate belonging to Baxi Panch Community and, therefore, there is no question for the petitioner being contested for the post of President of the Godhra Municipality. It is also said that in the meeting held on 19-1-2000 the Vice President was elected unanimously and, therefore, the election of President and Vice President cannot be challenged by the petitioner. It is also said that for the post of President election was held in which the respondent No.4 Rajeshkumar Vitthaldas Darji obtained 18 votes and the other contesting candidate, Mohmadhusein Kalora got 14 votes and, therefore, one vote of the petitioner could not have changed the situation and in any case the respondent No.4 could have been elected as President of the Godhra Municipality. It is also said that the petitioner's wife is working as a teacher in a School run by the Godhra Municipality and, therefore, he is not eligible to be or continued as a Councillor of the Municipality and, therefore, no error has been committed by the Collector in preventing the petitioner from participating in the meeting of 19-1-2000.

Mr.Vakharia, learned Sr. Counsel on behalf of the petitioner submitted that the Collector has illegally restrained the petitioner from participating in the meeting or contesting the election for the President and Vice President on 19-1-2000. It is submitted that Section 38 of the Gujarat Municipalities Act contemplates that if any Councillor during the term for which he has been elected or nominated becomes subject to any disqualification specified in Section No.11, then the Collector may exercise the said power. It is further submitted that the allegation against the petitioner is that his wife is serving as a teacher in a school run by Godhra Municipality and, therefore, he is disqualified from being a Councillor of that Municipality. Mr.Vakharia accordingly submitted that the wife of the petitioner is working as a teacher prior to his election as a Councillor of the Municipality and, therefore, the said question can only be decided by the Election Tribunal. Mr.Vakharia also submitted that respondent No.3 has already filed an Election Petition which is pending before the Election Tribunal. The Election Tribunal did not pass any interim order restraining the petitioner from discharging his duties as a Councillor of the Municipality. But the Collector has illegally restrained the petitioner from attending or participating in the Election of President and Vice President in the meeting of 19-1-2000. It is also submitted by

Mr.Vakharia that provisions of Section 38 will apply only in case when a Councillor earns any disqualification during the term of his office as a Councillor. It is accordingly submitted by Mr.Vakharia that before the first meeting of the Municipality, it cannot be said that the petitioner has assumed the office of Councillor and, therefore, there is no question of his earning disqualification as a Councillor of the Municipality before the first meeting. The learned Counsel accordingly submitted that the Collector has exercised a jurisdiction not vested in him under the law and he has most illegally passed the ex-parte order restraining the petitioner from participating in the meeting. Mr.Vakharia has drawn my attention to the case decided by this Court and reported in 1969 (10) GLR at Page 8 that the employment of the wife will not create any disqualification. Relying on the said decision, Mr.Vakharia submitted that even if the wife of the petitioner is in employment of the Godhra Municipality, as per the decision of this Court, it cannot be said that the petitioner has earned any disqualification and, therefore, there is no reason for the Collector to restrain the petitioner from participating in the meeting of 19-1-2000 and contesting the election. Mr.Vakharia accordingly submitted that the order of the Collector be quashed and the respondents be directed to hold a fresh election for the Vice President so as to enable the petitioner to participate and contest the election for the post Vice President. It is also submitted by Mr.Vakharia that the election of the President also be quashed in view of the fact that because of the absence of the petitioner, his followers did not participate in the election and had the petitioner been allowed, then it would have made a difference in the election of the President, respondent No.4. Mr.Vakharia accordingly submitted that the election of the President and Vice President be quashed.

Mr.H.P.Raval, learned Counsel appearing on behalf of the respondent No.2 submitted that similar question arose in a case before the Division Bench of the Bombay High Court in "Rammayya Venkat Narsu Bura Vs. The State of Bombay and Another" reported in AIR 1960 at page 46. It is accordingly submitted by Mr.Raval that Section 38 of Gujarat Municipalities Act provides that if any Councillor during the term for which he has been elected or nominated becomes subject to any disqualification specified in Section 11 shall be disabled from continuing to be a Councillor and his office shall become vacant. It is further submitted by Mr.Raval that the Division Bench of the Bombay High Court have also held that the

ground of disqualification is continuing to remain till the employment of the petitioner's wife continues. It is further held that every day she continues in service there arises a conflict between interest and duty of the petitioner. Therefore, the Councillor becomes subject to the disqualification because of the employment of his wife. It is also held by the Bombay High Court that the disqualification not only exists at the time of nomination of respondent No.2 as a candidate, but continues thereafter, even after he was elected. In this view the Bombay High Court held that the provisions of Section 28(1) of the Bombay Municipal Boroughs Act, which is almost similar to the Section 38 of the Gujarat Municipalities Act, must apply to the case of the Councillor as a disqualification was not only pre-existing one but one which continues after the election and still continues. It is on the basis of this judgement Mr.Raval, learned Counsel appearing on behalf of the respondent No.2 submitted that the Collector has correctly restrained the petitioner from participating or contesting the election on 19-1-2000. I have gone through the judgement passed by the Division Bench of the Bombay High Court. The decision of the Bombay High Court cannot apply in the facts and circumstances of the present case on the following grounds, namely:

(1) the provisions of Section 11 of the Bombay Municipal Boroughs Act are not similar to the provisions of Section 11 of the Gujarat Municipalities Act. Clause (viii) of Sub-Section (3) of Section 11 of the Gujarat Municipalities Act provides that a person shall not be deemed to have incurred disqualification merely being a relative of a person who is in employment with or under or by or on behalf of the Municipality. The aforesaid provisions have not been made in the Bombay Municipal Boroughs Act. This High Court in a judgement reported in 1969 (10) GLR at Page 8 have held that the employment of the wife cannot disqualify the husband who has been elected as a Councillor.

2) It appears that the Division Bench of the Bombay High Court interpreted the word "nominated" to a period when the Councillor has filed his nomination. This is so as Mr.Raval has also argued that the word "nominated" used in Section 38(1) will refer to the period of nomination of a Councillor as there is no provision in the Act for a nominated member. I am of the view that the word "nominated" used under Section 38(1)

cannot refer to a period of filing of the nomination by a Councillor. Section 38(1) provides, inter alia, if any Councillor during the term for which he has been elected or "nominated" must refer to a period for which the Councillor has been elected for that term. Mr.Vakharia has drawn my attention to Section 42 of the Bombay Municipal Boroughs Act, wherein it has been provided for appointment of Councillor by the Collector and such Councillor shall be deemed to be a elected Councillor. It is true that in Section 42 the word "nominated" has not been used but I am clearly of the view that the appointment under Section 42 of a Councillor is a "nominated" Councillor and the word "nominated" used in Section 38 must refer to a nominated candidate appointed under Section 42 of the Bombay Municipal Boroughs Act. After reading the judgement of the Bombay High Court, it does not appear that when the case was argued the provisions of Section 42 was brought to the notice of the Court. The Apex Court has decided cases and interpreted the provisions of Articles 191 and 192 of Constitution of India. The provisions of the aforesaid Articles of Constitution of India are almost similar to the provisions of Sections 11 and 38 of the Gujarat Municipalities Act. Having regard to the interpretation by the Apex Court I am of the view that at least, prima facie, it cannot be said that the petitioner earns disqualification because of his wife's employment in Godhra Municipality before he assumes office as a Councillor. It is an admitted fact that the election of the petitioner has been challenged by the respondent No.3 by an Election Petition which is pending before the Election Tribunal (District Judge, Godhra). This fact was also disclosed to the Collector by respondent No.3 in his Application under Section 38 of the Gujarat Municipalities Act. It is an admitted fact that the wife of the petitioner is in employment prior to the election of the petitioner as a Councillor in the Municipality. Therefore, in view of the aforesaid allegation an Election Petition is competent. Prima facie, it does not appear that an Application under Section 38 is maintainable.

After considering the submissions of learned Counsel for both the parties and after going through the papers and documents as adduced in the case I am of the

view that the Collector, respondent No.1, has committed an error in restraining the petitioner from participating or contesting the election on 19-1-2000. It is an admitted fact that the Collector did not restrain the petitioner from acting as a Councillor of Godhra Municipality since the petitioner has been duly elected as a Councillor of the Municipality. Unless his election is set aside by Election Tribunal or his seat becomes vacant as per provisions of the Gujarat Municipalities Act, he should not have been restrained by the Collector from participating or contesting the election on 19-1-2000. Therefore, the order of the Collector is without jurisdiction and he has committed an illegality in restraining the petitioner from participating or contesting the election of Godhra Municipality on 19-1-2000 and, therefore, the interim order passed by the Collector is required to be quashed and accordingly the order of the Collector is quashed.

It appears that the election of President and Vice President of Godhra Municipality has already been held on 19-1-2000 and respondents No.4 and 5 have been duly elected as President and Vice President of the said Municipality. It is contended by Mr.Vakharia that had the petitioner been allowed to participate in the meeting, the result of the election of President would have been otherwise and further the petitioner could have contested for the post of Vice President. Mr.Vakharia accordingly submitted that as the petitioner has been illegally restrained from participating in the meeting and also restrained from contesting the election, the entire election of President and Vice President of Godhra Municipality held on 19-1-2000 be quashed and fresh election be held. It appears that there are 36 Councillors in Godhra Municipality and 35 members were present in the meeting during the election of President and Vice President. It further appears that the Vice President was elected unopposed and the post of President was reserved for Baxi Panch Community. It is admitted by Mr.Vakharia that the petitioner does not belong to Baxi Panch Community and therefore, there is no question of the petitioner being contesting for the post of President. Mr.Vakharia, however, submitted that even if the petitioner is not entitled to contest for the post of President, but it could have made a difference in the result had the petitioner been allowed to participate in the meeting. Mr.Vakharia submitted that the respondent No.4 got 18 votes and the other Contestant got 14 votes and out of 35 Councillors, three abstained from voting. It is submitted by Mr.Vakharia that if the petitioner were allowed to participate in the meeting, the said

three Councillors could have joined him and in that event there would have been a tie between the respondent No.4 and the other contestant. It is accordingly submitted that for fairness, election of President is also required to be held afresh. Mr.Raval, learned Counsel appearing on behalf of the respondent No.2 submitted that it is not correct that the three Councillors, who abstained from voting of the President could have joined the petitioner. The learned Counsel draws my attention to the affidavit filed by the aforesaid three Councillors. In the said affidavit, it has been stated by the three Councillors that they were not interested in the election of President and Vice President and, therefore, they did not participate in the election. Accordingly, Mr.Raval submitted that the participation of the petitioner in the meeting could have hardly made any difference in the election of the President. It is further submitted by Mr.Raval that since the Vice President has been declared elected as unopposed and unanimously, there is no scope for the petitioner to be elected as Vice President. Mr.Raval accordingly submitted that since the election has already been held and the President and Vice President have already been elected the said election may not be quashed.

It is true that the right of the petitioner has been curtailed by the order of the Collector by not allowing him to participate in the meeting or to contest the election for the post of Vice President. But since the meeting has already been held and the President has been elected by majority of the Councillors of the Godhra Municipality, and the post of President being a reserved one, I am of the view that it would not be proper to unsettle the settled position. Further, it appears that the Vice President was chosen unanimously by the Councillors of Godhra Municipality and in that view even if the right of the petitioner is infringed, fresh election may not be called for unsettling the position. However, since the petitioner is aggrieved by the illegal order of the Collector I am of the view that a test be taken by the Collector or by his Authorised Officer in a meeting specially called for this purpose to ascertain whether the President and Vice President of the Municipality enjoys the support of the majority of the Councillors of the said Municipality. Accordingly the order of the Collector dated 18-1-2000 is quashed and set aside. The Collector is directed to convene a special meeting of Godhra Municipality within 30 days from the date of receipt of this order and to ascertain whether the President and Vice President of the Godhra Municipality enjoys the support of the majority of the

Councillors. In the President, respondents No.4 and 5 respectively enjoy the support of the majority of the Councillors, then the election of President and Vice President may not be disturbed. If, however, the President and Vice President, respondents No.4 and 5 respectively do not enjoy the majority support, in that event a fresh election be held for electing the President and Vice President of the Godhra Municipality. The petition is disposed of accordingly. Rule is made absolute to the extent as above. No order as to costs.

Date: 18/10/2000 (P. K. Sarkar, J.)

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